No. 71-1470

May 18, 1972 - Motion to affirm of Pennsylvania
Assn. of Independent Schools, joining in
motion to affirm of Kurtzman, Sloan and nam
defendant schools filed. NOT PRINTED.

INDEX TO BRIEF.

TABLE OF CASES CITED.

TABLE OF CASES CITED (Continued).

STATUTES, CODES AND AUTHORITIES CITED.

OPINION BELOW.

The opinion of the three-judge District Court for the Eastern District of Pennsylvania is not yet reported.

The Opinion and Orders of said court are set forth at pages 1 app-11 app of the Appendix to the Jurisdictional Statement.

JURISDICTION.

This action, to enjoin enforcement of a Pennsylvania statute as unconstitutional, was brought under 28 U. S. C. § 1343 and § 2281, and was heard by a three-judge District Court of the Eastern District of Pennsylvania, pursuant to 28 U. S. C. § 2284. A final decree of the three-judge court granting defendants-appellees' motion to dismiss for failure to state a claim was entered on November 28, 1969, and a timely appeal was thereafter taken by plaintiffs-appellants to the Supreme Court of the United States. On June 28, 1971, this Court reversed the decision of the three-judge court, and remanded the case for further proceedings consistent with the opinion of this Court.

Appellants thereafter moved for summary judgment and a permanent injunction. A final Order without opinion was issued by the three-judge court on December 28, 1971, entering summary judgment for plaintiffs but granting only partial injunctive relief as set forth hereafter. Notice of Appeal was filed in the District Court by appellants on January 10, 1972, and amended on January 31, 1972. By Order dated February 17, 1972, Mr. Justice Brennan granted appellants' application for an extension of time for docketing appeal, pursuant to Rule 13, until May 10, 1972. On February 22, 1972, an opinion was issued by the three-judge District Court in support of the Order en-

tered on December 28, 1971.[1] The appeal was docketed on May 10, 1972, and this Court noted probable jurisdiction on May 22, 1972.

The jurisdiction of the Supreme Court of the United States to review the Order of December 28, 1971, by direct appeal is conferred by 28 U. S. C. § 1253. That jurisdiction is sustained by the decision of this Court in *Briggs v. Elliott*, 342 U. S. 350 (1952).

STATUTE AND CONSTITUTIONAL AMENDMENT INVOLVED.

The statute of Pennsylvania which was held unconstitutional by this Court in *Lemon v. Kurtzman*, 403 U. S. 602 (1971) (hereinafter cited as *"Lemon"*), is entitled "Pennsylvania Nonpublic Elementary and Secondary Education Act", Act of June 19, 1968, P. L. —, No. 109, 24 P. S. (Purdon) § 5601, et seq. (hereinafter called "Act 109"), and is set forth in Appendix A to the majority opinion of the three-judge court in *Lemon v. Kurtzman*, 310 F. Supp. 35, 55-58 (E. D. Pa. 1969). It is also set forth at pages 12 app-19 app of the Appendix to the Jurisdictional Statement.

The statute provided that a portion of the proceeds of a certain tax on horse racing should, under the direction of the Superintendant of Public Instruction, be used for "reimbursement" to nonpublic schools for the "purchase" of certain defined "educational services", pursuant to "contracts" between the nonpublic schools and the state. The payments in reimbursement for the cost of these services were to be made after the close of the school year in which the services were provided.

1. The Order entered on February 22, 1972 is erroneously dated February 22, 1971.

The First Amendment of the Constitution of the United States, made applicable to the states through the Fourteenth Amendment, provides as follows:

> "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

QUESTION PRESENTED.

The three-judge court has held that, although Act 109 was found unconstitutional on its face by this Court, nonetheless public funds held by the State of Pennsylvania under Act 109 must now be paid out to reimburse nonpublic schools for "services" performed or "costs" incurred prior to June 28, 1971, when the Act was declared unconstitutional.

A single question is presented:

> Does the Supreme Court's decision that Act 109 is unconstitutional on its face prohibit subsequent disbursement of public funds under the Act to sectarian schools for the costs of "secular educational services" provided by those schools before the Act was held unconstitutional?

STATEMENT OF THE CASE.

This appeal results from the continuing efforts of the supporters of state financial aid to religious or church-related schools to find some means of evading the constitutional barriers to such aid imposed by the First Amendment. On June 19, 1968, Act 109 of the Laws of Pennsylvania became effective. Passage of the statute followed a series of hearings before the Committee on Basic Education of the House of Representatives of the Commonwealth of Pennsylvania. The purpose of these hearings was stated at the outset by the Chairman of the Committee: "to find out if state funds can be used for aid to nonpublic schools" in view of the fact that "these school systems are in serious financial difficulty."[2] Within one month after passage of Act 109, appellants publicly announced their intention to challenge the constitutionality of this legislation, and on July 3, 1969, a complaint was filed in this action.

The statutory scheme which was the target of this litigation called for a financial subsidy to nonpublic schools using public funds derived from a special tax. As stated by this Court in *Lemon:*

> "The statute authorizes appellee state Superintendent of Public Instruction to 'purchase' specified 'secular educational services' from nonpublic schools. Under the 'contracts' authorized by the statute, the State directly reimburses nonpublic schools solely for their actual expenditures for teachers' salaries, textbooks, and instructional materials. A school seeking reimbursement must maintain prescribed accounting

2. Official transcript, pp. 3-4, opening statement of Chairman Fox, Committee on Basic Education, House of Representatives Hearing of April 3, 1968.

procedures that identify the 'separate' cost of the 'secular educational service'. These accounts are subject to state audit." 403 U. S. at 609-10.

Reimbursement under the statute is limited "solely" to the "secular" subjects of mathematics, modern foreign languages, physical science and physical education. All textbooks and instructional materials used in the program have to be approved by the state. Payments for "services" rendered by nonpublic schools pursuant to the "contracts" authorized by the statute are not to be made until after the school year in which the services were provided.

On November 28, 1969, the three-judge District Court ruled, in a 2-1 decision (Hastie, Chief Circuit Judge, dissenting) that the Act was constitutional. Plaintiffs thereafter filed a Notice of Appeal to this Court on December 17, 1969. As appellees asserted in the court below, it was not until January 15, 1970, following the filing of this Notice of Appeal from the decision of the three-judge court, that the nonpublic schools renewed their "contracts" for reimbursement under the Act for "services" to be rendered during the 1970-71 school year. The Supreme Court noted probable jurisdiction of the appeal on April 20, 1970, prior to the commencement of the 1970-71 school year.

On June 28, 1971, this Court handed down its decision on the appeal, reversing the District Court and declaring the Act unconstitutional on its face. The Court repeatedly characterized the statutory scheme as providing a "direct money subsidy", or "continuing cash subsidy", or "government cash grants" to nonpublic schools, and concluded that Act 109 contravened the First Amendment by necessarily fostering excessive entanglement between church and state and by providing state financial aid directly to

church-related schools.[3] The case was remanded for further proceedings consistent with the opinion of this Court.

Appellants then moved for summary judgment and a permanent injunction restraining any further expenditures of funds under Act 109 (A6-A7). Appellees, after first contending that further pleadings and evidence were required in order to determine whether the statute was unconstitutional as applied (A8-A11), then insisted that even if Act 109 was incapable of constitutional application, the nonpublic schools were still entitled to reimbursement under the unconstitutional Act for costs incurred in the 1970-71 school year, on the ground that the schools had acquired vested "contractual" rights which should not be affected by the decision of this Court (A12-A15). If appellees' position is sustained, the State of Pennsylvania will now be obliged to expend more than $23 million as a further subsidy for the operation of nonpublic schools,[4] although this Court has already concluded that such payments would, on their face, violate the First Amendment.

Appellants contended in the court below that the normal effect given to judicial decisions should apply to bar the payments here in question; that the rationale of *Lemon* dictated such a result; that no prior decision of this Court compelled or even suggested that *Lemon* should not be applied to prohibit payments not yet made by the state; and that extending the limited doctrine of prospectivity to this situation would have potentially profound adverse consequences in the broad area of constitutional adjudication involving expenditures of public funds.

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3. 403 U. S. at 621. See also separate opinion of Justice Brennan, 403 U. S. at 652 and concurring opinion of Justices Douglas and Black, 403 U. S. at 637.

4. According to appellees, the fund in question now approximates $24 million. Appellees Response to Appellants' Application to Mr. Justice Brennan for Extension of Injunction Pending Appeal and Motion for Expedited Consideration of the Appeal, para. 6.

The three-judge court, by its Order of December 28, 1971, rejected appellants' foregoing arguments and, *sub silentio*, denied appellants' motion for permanent injunction insofar as it sought to restrain payments not yet made under the Act for "services" performed or costs incurred prior to June 28, 1971. In its Opinion issued on February 22, 1972, the lower court stated its conclusion that the old "Blackstonian" view of absolute retroactivity of judicial decisions is no longer viable; that, as noted by this Court in *Linkletter v. Walker*, 381 U. S. 618, 628 (1965), the current view is that "in appropriate cases the Court may in the interest of justice make the rule prospective"; that the standard for determining whether to allow retrospective application is no different in the area of constitutional adjudication than in any other area of law; and that the decision of this Court in *Lemon* must be examined to determine whether prospective application "would in any way undermine its underlying basis and its rationale and, if not, then [the court must] balance the equities between the parties." Appendix to Jurisdictional Statement, 7 app.

Applying the foregoing approach, the three-judge court decided that "excessive entanglement" was the exclusive constitutional infirmity articulated by this Court in striking down Act 109; that this doctrine was intended primarily to avoid *future* entanglement and encroachment; and that subsequent reimbursements for costs incurred by nonpublic schools prior to the decision in *Lemon* would not offend the rationale of that ruling. The lower court then turned to a "balancing of the equities" between the parties and determined that a greater hardship would result to appellants if the funds were withheld, than would result to appellees if the funds were expended. Thus, the lower court concluded that the prior mandate of this Court should be limited so as to permit subsequent payments by the state in

respect of sectarian school operations during the 1970-71 school year.

Meanwhile, the proponents of public aid to religious and church-related schools in Pennsylvania have continued to generate new legislation to subsidize those schools as fast as earlier attempts have been invalidated by the courts. Within two months after the decision of this Court in *Lemon*, a new statute was enacted by the Pennsylvania legislature calling for a direct state subsidy to all parents whose children attend nonpublic schools. Act 92 of the Pennsylvania General Assembly, August 27, 1971. A three-judge court for the Eastern District of Pennsylvania concluded, on April 6, 1972, that this statute was unconstitutional on its face under the Establishment clause of the First Amendment. *Lemon v. Sloan*, E. D. Pa., Civ. Action No. 71-2223. This decision is being appealed to this Court, but on May 31, 1972, the Pennsylvania House of Representatives passed a package of legislation providing $48 million in aid to nonpublic schools, including two bills which would grant to nonpublic schools, free of charge, certain "auxiliary services", "instructional materials", "equipment" and textbooks. House Bills Nos. 2151 and 2152, Session of 1972. This legislation was approved by the Pennsylvania Senate on July 1, 1972.

SUMMARY OF ARGUMENT.

The court below has held that the ruling of this Court in *Lemon v. Kurtzman*, 403 U. S. 602 (1971), which declared Pennsylvania Act 109 unconstitutional on its face under the First Amendment, should not be applied so as to bar a *subsequent* subsidy to religious or church-related schools in respect of "services" provided by those schools prior to this Court's ruling in *Lemon, supra.* In so holding, the lower court viewed the issue solely in terms of whether *Lemon* was entitled to "prospective" or "retrospective" effect.

This ruling of the district court is erroneous and should be reversed for the following reasons:

1. The rationale of this Court's decision in *Lemon* requires that *all future* payments under Act 109 be prohibited. Such an application accords no more than normal prospective effect to *Lemon,* without raising any questions of "retroactivity". The State of Pennsylvania cannot pay out any additional subsidies to sectarian schools under the Act without either engaging in the very surveillance and control which was explicitly found unconstitutional by this Court in *Lemon,* or providing a direct cash subsidy to religious schools, without any controls to ensure its use for secular purposes, all in violation of the Establishment clause.

2. In according only limited prospective effect to the ruling in *Lemon,* the lower court made a radical and unwarranted departure from the principles heretofore developed by this Court. Almost without exception, the only circumstances where this Court has authorized limitations on the usual retroactive effect of a judicial ruling are (a) where the rights of innocent bond-holders would be voided and public financing rendered chaotic by giving retroactive

effect to a decision invalidating the statute under which the bonds were sold, or (b), where an overruling decision substantially alters the previously accepted rules for conducting criminal proceedings, thus raising the question whether all previous convictions based on the former rule are to be overturned. None of the considerations justifying these narrow exceptions to the general rule of retroactivity are present here; indeed, all of the relevant facts demonstrate that the schools have no contractual or equitable rights to the subsidy in question.

3. The entire statutory scheme of Act 109 is consistent with a system of subsidies rather than contractual payments. There is no showing that the schools provided any more services for which "reimbursement" was sought than they would have provided without the Act. Accordingly, appellees cannot establish any vested "contractual" rights to further subsidies, assuming that such rights could override the mandate of *Lemon* under any circumstances.

4. Appellees have not demonstrated any justifiable reliance on the constitutionality of Act 109 which would warrant allowing further subsidies under the statute. On the contrary, it was uniformly recognized from the beginning that the constitutionality of the statute was, at the very least, open to question, and an appeal was already filed in this Court before any alleged acts of "reliance" occurred. Under the circumstances, the posture of the schools is scarcely that of innocent reliance; rather it can best be characterized as a deliberate gamble to seek whatever funds could be obtained from the state while Act 109 was still on the books. Having elected to take a chance on winning the prior appeal in this action, appellees are now in the same position as any litigant who chooses to take action on the basis of legal advice that turns out to have been erroneous. Such "reliance" has never been regarded as sufficient

reason for limiting the usual effect of the judicial ruling on the rights and obligations of the parties.

5. The rationale of the ruling below will lend inevitable encouragement to legislative efforts (however well intended) to disburse public funds for parochial school aid, even for a limited time, under statutes of questionable constitutionality. The tendency of the law ought not and need not provide any impetus in this direction. Respect for the judicial process, obedience to judicial decisions, and avoidance of political strife over aid to religious schools will all be promoted by adhering to the mandate of *Lemon*, and denying any further disbursements to sectarian schools under Act 109.

ARGUMENT.

I. The Rule of Law Articulated by This Court in *Lemon v. Kurtzman* Bars All Subsequent Payments to Sectarian Schools Under Act 109.

Appellees and the court below have conceived the question here presented solely in terms of whether a "retroactive" or "prospective" effect should be accorded to this Court's prior decision in *Lemon v. Kurtzman*, 403 U. S. 602 (1971). The formulation is somewhat misleading, and for this reason the specific question to be decided bears repeating at the outset: Does the ruling in *Lemon*, which struck down Act 109 as unconstitutional on its face, bar *subsequent* subsidy payments under the Act by the state of Pennsylvania to religious and church-related schools, in an amount exceeding $20,000,000?[5]

It is not particularly helpful to seek an answer to this question by characterizing the relief sought by appellants as "retroactive". Unless carefully qualified, the term is more confusing than enlightening. Its use would have been far more appropriate had appellants demanded a *return* to the state of subsidies previously paid out under Act 109 to sectarian schools.[6] But appellants have not taken that position; they have urged only that *subsequent* payments under the unconstitutional act are improper. In a real sense, such an interpretation of this Court's decision in *Lemon* grants to it no more than the usual prospective ef-

5. The total fund collected by the state under the special tax created by Act 109, but not yet paid out to nonpublic schools, approximates $24,000,000. Pupils in religious or church-related schools account for more than 96% of the Pennsylvania nonpublic school population. *Lemon v. Kurtzman, supra*, 403 U. S. at 610.

6. See *Box Office Pictures v. Board of Finance and Revenue*, 402 Pa. 511, 166 A. 2d 656 (1961), cited by the court below, Appendix to Jurisdictional Statement, at 5 app., fn. 4.

fect to which all judicial determinations are customarily entitled, particularly rulings such as this one which uphold fundamental First Amendment rights occupying an acknowledged preferred place[7] in the hierarchy of constitutional values.

The central point is that a prohibition of all subsequent payments under Act 109 is totally harmonious with the articulated basis of the decision in *Lemon*. This Court there held that the scheme of governmental aid contemplated by the Act amounted to a direct cash "subsidy" or "grant" to church-related schools, with accompanying means of state control and surveillance which, though designed to avoid use of public funds for religious purposes, necessarily entangled church and state in myriad ways forbidden by the First Amendment. 403 U. S. at 620-22. The Court therefore concluded that the statute was beyond salvage under any circumstances and that all payments pursuant to the Act were unconstitutional. The case was remanded for further proceedings consistent with the opinion. Appellants accordingly moved for summary judgment and a permanent injunction against all *future* disbursements under the Act, and were surprised—to say the least—at appellees' contention that further aid to religious schools could be provided under the stricken statute without infringing upon the mandate of this Court.

Appellees' position rests upon a fundamental misinterpretation of *Lemon*, which the lower court adopted in justifying its denial of normal prospective effect to the ruling. Appellees insist that the problem of "entanglement" articulated in *Lemon* constitutes the only constitutional infirmity of Act 109, that this doctrine is separate and distinct from (if not in opposition to) the dictates of the Establishment and Free Exercise clauses of the First

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7. *Thomas v. Collins*, 323 U. S. 516, 530 (1945).

Amendment,[8] and that payment of the subsidy in question would not offend the "entanglement" rationale. The lower court found this view persuasive in concluding that:

> "With the decision of the Supreme Court in this case and this [lower] Court's subsequent entry of summary judgment in favor of plaintiffs and the issuance of a permanent injunction, restraining any future payment of state funds to non-public schools [*sic*—the lower court did not permanently enjoin the future payment here at issue, and the injunction in any event runs only against sectarian schools], the statutory scheme which fostered the excessive entanglement between the state and religion has been dissolved." Appendix to Jurisdictional Statement, at 8 app.

The approach taken by appellees and the lower court is defective in several respects. First, appellees have missed the central thrust of the "entanglement" notion by treating it as a standard imported into the First Amendment without relation to the Establishment or Free Exercise clauses. In fact, the concept is rooted in both clauses. It neatly focuses on the virtually insoluble problems raised by attempts to provide substantial financial aid to religious schools without running afoul of the Establishment clause. The very controls which are necessary to preclude use of a governmental subsidy in support of religious objectives only inject the state farther into the affairs of religious institutions at the ultimate risk of interfering with rights under the Free Exercise clause.[9] Thus the concept of "entangle-

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8. See Petition of Appellees for Rehearing and Supplemental Opinion, *Lemon v. Kurtsman*, October Term, 1970, No. 89, at pp. 16-29.

9. A distinguished commentator has adverted to the sometimes conflicting demands of the First Amendment impinging on parochial school aid legislation:

ment" supports the protection of rights guaranteed by *both* clauses of the First Amendment. As Justice Rutledge observed in his eloquent dissent in *Everson v. Board of Education*, 330 U. S. 1, 53 (1946): "The great condition of religious liberty is that it be maintained free from sustenance, as also from interferences by the state."

The assertion that the state of Pennsylvania can dispense another $24 million as a subsidy to nonpublic schools under Act 109, without plunging farther into the thicket of forbidden entanglement, is therefore patently wrong. In fact, this position only impales appellees more securely on the horns of the dilemma that Act 109 was unsuccessfully designed to avoid in the first place. The state is now confronted with requests for subsidy from 1,181 nonpublic schools, in "reimbursement" of costs incurred in providing certain "secular educational services" during the 1970-71 school year. If any intelligent appraisal of these requests is to be made, the state must look into them with some care. Indeed, appellees themselves have previously emphasized to this Court and the court below that, in Pennsylvania's diverse religious community, each sectarian school must be scrutinized separately to determine the exact degree of religious involvement in the administration, curriculum and operation of each institution.[10]

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9. (Cont'd.)

"In a large sense, both of the guarantees of the first amendment—the free exercise and the non-establishment clauses—are directed harmoniously toward these purposes [voluntarism in religious matters, mutual abstention of political and religious institutions, and governmental neutrality between religion and nonreligion], though in the context of specific governmental measures the two guarantees may point in different directions and the purposes themselves may be discordant." Freund, Comment, *Public Aid to Parochial Schools*, 82 Harv. L. Rev. 1680, 1684 (1969).

10. Petition of Appellees for Rehearing and Supplemental Opinion, *Lemon v. Kurtzman*, October Term, 1970, No. 89, at pp. 10-12; Defendants' Motion for Denial of Plaintiffs' Motion for Summary [illegible]ment and Permanent Injunction, A8-A11.

If the funds now sought by appellees are to be disbursed, the state is presented with a Hobson's choice. Either the state must, in an effort to insure proper use of the subsidy, examine into each school's curriculum content, methods of teaching, and segregation of expenses between "secular" and "religious" activities—thereby engaging in precisely the kind of entangling inquiry and surveillance that was explicitly forbidden by this Court—or else the state must simply turn the funds over blindly to the religious and church-related schools, thus providing a subsidy which may directly support religious practices and teaching, in flagrant contravention of the Establishment clause. As this Court concluded in *Lemon:* "A comprehensive, discriminating, and continuing state surveillance will inevitably be required to ensure that these restrictions are obeyed and the First Amendment otherwise respected." 403 U. S. at 619. Payment of the subsidy in question would therefore be equally offensive to the Constitution in either case.

If it be urged that no inquiry or control can now be effectively undertaken by the state because the "costs" in question have already been incurred, the answer is that such inquiry is no less required because it may be more difficult to accomplish. Moreover, this Court has specifically pointed out that, "in particular, the [Pennsylvania] government's post-audit power to inspect and evaluate a church-related school's financial records and to determine which expenditures are religious and which are secular creates an intimate and continuing relationship between church and state." 403 U. S. at 621-22. This power is exercisable only *after* the "costs" involved have been incurred. On the other hand, to the extent that appellees contend that the funds can now be paid over without any scrutiny by the state, they only undercut the very safe-

guards which are necessary to ensure that public moneys are utilized only for secular purposes.

Finally, neither appellees nor the court below have acknowledged that Act 109, in providing a direct subsidy to church-related schools, contravenes the Establishment clause without regard to the additional problems raised by the entangling control provisions of the statute. This Court has already so held, in finding that "the Pennsylvania statute, moreover, has the *further defect* of providing state financial aid directly to church-related schools." 403 U. S. at 621 (emphasis added). Justice Brennan was most specific on this point in his separate opinion in the *Lemon* and *Dicenso* cases and *Tilton v. Richardson,* 403 U. S. 672 (1971): "I do not believe that elimination of these aspects of 'too close a proximity' [i.e., measures of surveillance and control] would save these three statutes." 403 U. S. at 652.[11]

The payment of an additional direct subsidy under the Act is therefore unconstitutional in and of itself without regard to whether the machinery of state controls has been dismantled by this Court's prior ruling. The only possible justification that could be offered for such a payment is that it will be the last one under Act 109. But the First Amendment's prohibitions apply as much to one subsidy as they do to many. From the days of Madison's *Memorial and Remonstrance Against Religious Assessments,* it has al-

11. Act 109 has the additional defect, noted by Justice Brennan, that (unlike the Rhode Island statute in the *Dicenso* case) it does not limit the subsidy to sectarian schools whose average per-pupil expenditure on secular education was less than the state's average:

> "Thus the statute on its face permits use of the state subsidy for the purpose of maintaining or attracting an audience for religious education, and also permits sectarian schools not needing the aid to apply it to exceed the quality of secular education provided in public schools. These features of the Pennsylvania scheme seem to me to invalidate it under the Establishment clause as granting preferences to sectarian schools." 403 U. S. at 653, fn. 11.

ways been a question of principle, not of amount. See *Everson v. Board of Education, supra,* at 40-41 (Rutledge, J., dissenting).

The ultimate conclusion is inescapable: any further payments of subsidies to church-related schools pursuant to Act 109 will necessarily conflict with both the rationale and specific holding of this Court in the prior appeal. If this proposition is correct, the proposed payments should be denied, without further reference to the abstract concept of "retroactivity" which appellees have injected into the case.

II. Further Payments to Sectarian Schools Under Act 109 Cannot Be Justified on the Grounds That the Schools Signed "Contracts" or Rendered "Reimbursable Services" Prior to the Date When the Act Was Declared Unconstitutional.

Appellees and the lower court have sought to legitimize additional payments to church-related schools under Act 109 on the theory that certain events which occurred prior to June 28, 1971—the date of this Court's ruling of unconstitutionality—now require disbursement of the funds in question. The sequence of events should be recalled:

— on November 28, 1969, the lower court ruled 2-1 (over the dissent of Judge Hastie, Chief Circuit Judge) that Act 109 was constitutional;

— on December 17, 1969, appellants filed an appeal to this Court;

— on January 15, 1970, the nonpublic schools executed "contracts" (in the terminology of the Act) calling for reimbursement of "secular educational expenses" to be incurred in the school year commencing in September, 1970;

— on April 20, 1970, this Court noted probable jurisdiction of the appeal;

— on June 15, 1970, a three-judge court of the District of Rhode Island unanimously held that the Rhode Island Salary Supplement Act (providing a system of state aid to parochial schools raising constitutional questions similar to those posed by Act 109) violated the First Amendment, *Dicenso v. Robinson*, 316 F. Supp. 112 (D. R. I. 1970);

— in September, 1970, the nonpublic schools began performing the "secular educational services" to be subsidized under Act 109;

— on June 28, 1971, this Court ruled that Act 109 (and the Rhode Island statute) were unconstitutional;

— on September 1, 1971, there came due under the terms of Act 109 the first of four quarterly installments of payments in respect of "services" provided in the preceding school year.

Given this sequence, appellees and the lower court insist that the ruling in *Lemon* would have to be applied retroactively to prohibit the payment now of a subsidy in respect of the 1970-71 school year. This approach diverts attention away from the focal point of *Lemon*—payment by the state of an unconstitutional subsidy to religious schools—and concentrates instead upon the statutory procedures by which the schools applied for the subsidy. Only in this manner is it possible to speak of a "retroactive" application of *Lemon* invalidating pre-existing arrangements. Appellants have indicated in the preceding section of this brief why this is a distortion of the meaning of *Lemon*. But even if it be assumed that events occurring prior to the decision in *Lemon* might have some bearing on whether additional

funds can be disbursed under Act 109, it is abundantly clear that such a result cannot be justified by the precedents of this Court, or the specific facts of this case.

A. The Precedents of This Court Furnish No Basis for According the Decision in *Lemon* a Limited Prospective Effect.

The lower court purported to base its limitation of the mandate in *Lemon* on the prior decisions of this Court. Appellants contend that those cases, dealing with the issue of when normal retrospective effect should be denied to a judicial ruling, do not support the decision below. On the contrary, the lower court's opinion represents a radical and unwarranted departure from existing precedent.

The normal rule, recognized by the District Court, is that judicial decisions operate retrospectively; that is, they determine legal rights and obligations with respect to events that have already transpired. It could hardly be otherwise, since it is the basic role of courts to decide disputes after they have arisen. Any losing litigant who elected to act on the basis of legal advice that turned out to be erroneous, may claim that the right or status which he unsuccessfully sought to vindicate before the court should be upheld because of his "reliance". It has never been thought that this circumstance—an inevitable consequence of having courts decide specific cases or controversies—justifies a limitation on the usual impact of a judicial ruling.

The classic articulation of the rule of retroactivity, as applied to judicial decisions which declare a statute unconstitutional, was given by this Court in *Norton v. Shelby County*, 118 U. S. 425 at 442 (1886), where Justice Field stated:

"An unconstitutional act is not a law; it confers no rights; it imposes no duties; it affords no protection; it creates no office; it is, in legal contemplation, as inoperative as though it had never been passed."

According to the lower court, the rule expressed in *Norton* "underwent a gradual erosion, culminating in the 1930's with *Great Northern R. Co. v. Sunburst Oil & Refining Co.*, 287 U. S. 358 (1932) and *Chicot County Drainage Dist. v. Baxter State Bank*, 308 U. S. 371 (1940)." Appendix to Jurisdictional Statement, at 5 app. But this assertion is true only in a very limited sense. While the rigid language of 19th century Blackstonian jurisprudence exemplified in *Norton* did give way to the more pragmatic formulations of positivism, the *result* enunciated in *Norton* was not significantly impaired: retroactivity continued to be accorded to judicial decisions almost without exception.

Of course appellants recognize that absolute retrospectivity was never applied with total inflexibility, either before or after *Norton*. In a narrow line of cases where legislation authorizing the issuance of municipal bonds had been declared invalid, it was held that bonds previously issued under the statutes would not be rendered void. *Gelpcke v. Dubuque*, 68 U. S. 175 (1864); *Douglass v. County of Pike*, 101 U. S. 677 (1880); *Taylor v. Ypsilanti*, 105 U. S. 60 (1882); *Cipriano v. City of Houma*, 395 U. S. 701 (1969); *Phoenix v. Kolodziejski*, 399 U. S. 204 (1970). However, the intimation contained in some of the earlier cases, to the effect that a judicial decision could not constitutionally invalidate prior contracts, was definitively rejected in *Tidal Oil Co. v. Flanagan*, 263 U. S. 444 (1924).

Outside this line of authority, the rule of retroactivity was almost invariably honored.[12] The cases cited by the

12. One very limited exception was recognized in *Brinkerhoff-Faris Trust & Savings Co. v. Hill*, 281 U. S. 673 (1930), where

lower court did not mark any significant retreat from the rule. In *Great Northern R. Co. v. Sunburst Oil & Refining Co., supra,* this Court merely concluded that the Constitution did not *require* a state court to give retroactive effect to an overruling decision.[13] *Chicot County Drainage Dist. v. Baxter State Bank, supra,* was decided on the basis of principles of *res judicata.* The dictum of Chief Justice Hughes quoted by the Court below,[14] was simply to the effect that not *every* decision invalidating a statute should necessarily have the effect of voiding all acts, rights and obligations to which the statute had previously given rise. Appellants do not quarrel with this general proposition.

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12. (Cont'd.)
it was held that an overruling state decision could not be applied retroactively so as to deny a taxpayer any opportunity to challenge the assessment of a state tax. Such a denial was found to be a violation of the Due Process clause of the Fourteenth Amendment.

13. Coupled with *Tidal Oil Co., supra,* this case made it clear that the Constitution is neutral on the subject of retroactivity in the abstract; that is, it neither forbids or compels it. But this not to say that retroactivity has not continued as the prevailing doctrine for reasons of sound judicial policy, or that the import of a particular constitutional ruling cannot by its own logic require that retroactive effect be given. See pp. 12-18, *supra.*

14. "The actual existence of a statute, prior to such a determination [of unconstitutionality], is an operative fact and may have consequences which cannot justly be ignored. The past cannot always be erased by a new judicial declaration. The effect of the subsequent ruling as to invalidity may have to be considered in various aspects, —with respect to particular relations, individual and corporate, and particular conduct, private and official. Questions of rights claimed to have become vested, of status, of prior determinations deemed to have finality and acted upon accordingly, of public policy in the light of the nature both of the statute and of its previous application, demand examination. These questions are among the most difficult of those which have engaged the attention of courts, state and federal, and it is manifest from the numerous decisions that an all-inclusive statement of a principle of absolute retroactive invalidity cannot be justified." 308 U. S. at 374, quoted at 6 app., Appendix to Jurisdictional Statement.

The only other significant exception to the rule of retroactivity has been recognized in certain cases involving overruling decisions with potential impact on thousands of prior criminal proceedings. Thus, in *Linkletter v. Walker*, 381 U. S. 618 (1965), relied upon heavily by the court below, it was held that the exclusionary rule of *Mapp v. Ohio*, 367 U. S. 643 (1961), which overruled *Wolf v. Colorado*, 338 U. S. 25 (1949), should not be applied retroactively so as to reopen every prior final criminal conviction in which the *Wolf* rule had been followed. This approach has been adopted with respect to certain other overruling decisions affecting criminal proceedings, e.g., *Tehan v. Shott*, 382 U. S. 406 (1966); *Johnson v. New Jersey*, 384 U. S. 719 (1966); *Stovall v. Denno*, 388 U. S. 293 (1967); *Desist v. United States*, 394 U. S. 244 (1969); *Jenkins v. Delaware*, 395 U. S. 213 (1969). But the practice has by no means been uniform even in this specific field of constitutional adjudication. E.g., *Roberts v. Russell*, 392 U. S. 293 (1968), holding that the rule of *Bruton v. United States*, 391 U. S. 123 (1968) which overturned *Delli Paoli v. United States*, 352 U. S. 232 (1957) was entitled to retrospective effect. Significantly, the Court indicated that reliance by law enforcement officials on the prior decision of this Court in *Delli Paoli* was not a countervailing factor: "The element of reliance is not persuasive, for *Delli Paoli* has been under attack from its inception and many courts have in fact rejected it." 392 U. S. at 295.[15]

Thus, whatever can be said about the breadth of the dictum in *Chicot*, or certain of the language in *Linkletter*,

15. Here, of course, there was no prior ruling of this Court upholding the validity of Act 109. While the lower court had sustained the statute in a 2-1 decision over Judge Hastie's powerful dissent, a three-judge district court had on June 15, 1970 (prior to the opening of the 1970-71 school year), unanimously struck down the very similar Rhode Island statute in *Dicenso v. Robinson*, 316 F. Supp. 112 (D. R. I. 1970), a decision that was upheld by this Court in the companion case to *Lemon*.

the fact is that this Court has exercised extreme caution in extending the limitations of prospectivity to cases in areas other than municipal bond litigation and criminal procedure.[16] The language in *Linkletter* has been consistently interpreted and applied by this Court only in other instances of overruling decisions in criminal law. It has never been thought to mean that every civil decision must be scrutinized on a case by case basis to decide which rulings should be prospective.

On the other hand, this Court has recently indicated that the *Chicot* dictum should be limited to the particular facts of that case. In *United States v. Estate of Donnelly*, 397 U. S. 286 (1970), it was held that a judicial decision giving a new interpretation of a section of the Internal Revenue Code of 1939, concerning the place to file a tax lien, was entitled to retrospective effect even though the result was to give priority to a lien on land against the claim of a bona fide purchaser who had acquired the property after checking for tax liens filed elsewhere in conformity with the earlier prevailing judicial interpretation of the statute. The lower court had relied largely on *Chicot* in giving only prospective effect to the later interpretation of the revenue code. This Court reversed, distinguishing *Chicot* and, according to the dissent, narrowly confining the dictum of Chief Justice Hughes to the particular facts involved in *Chicot*. 397 U. S. at 300 (Douglas, J., dissenting).

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16. One other circumstance that might justify a rule of prospectivity is when there is intense statutory compulsion to obey and conform to ordained practice under legislation which is later held invalid. Thus, where a federal taxpayer properly accrues and deducts a state tax on his federal income tax return, the subsequent invalidity of the state tax should not retroactively invalidate the taxpayer's federal return. *J. A. Dougherty's Sons, Inc. v. Commissioner of Internal Revenue*, 121 F. 2d 700 (3d Cir. 1941).

Obviously no such compulsion was exerted upon nonpublic schools to seek subsidies under Act 109.

In his concurring opinion, Justice Harlan rationalized the appropriate exceptions to retroactivity in very narrow terms:

> "The critical factor in determining when a new decisional rule should be applied to a transaction consummated prior to the decision's announcement is, in my view, the point at which the transaction has acquired such a degree of finality that the rights of the parties have become frozen. . . . [I]n the civil area that moment should be when the transaction is beyond challenge either because the statute of limitations has run or the rights of the parties have been fixed by litigation and have become *res judicata*. Any uncertainty engendered by this approach should, I think, be deemed part of the risks of life." 397 U. S. at 296.

The reluctance of this Court to broaden the carefully circumscribed range of exceptions to retrospectivity is understandable. As noted above, one unavoidable consequence of having courts decide specific disputes is that the losing party is often in the position of having acted in reliance, to some degree, on a mistaken understanding of his legal position. The fact of such honest reliance—later disappointed in court—does not mean that judicial decisions are given prospective effect only; any resulting loss is simply regarded as part of the uncertainties of life, and a necessary correlative of the judicial process.

This common sense notion rests on sound institutional values. In the words of one perceptive commentator who has expressed reservations about some of the language (if not the result) in *Linkletter*, the doctrine of absolute retroactivity is "despite some real shortcomings, a valuable judicial asset". Mishkin, *The Supreme Court 1964 Term, Forward: The High Court, The Great Writ and the Due Process of Time and Law*, 79 Harv. L. Rev. 56, 57 (1965).

The effectiveness of the judicial process ultimately depends upon public acceptance. That acceptance, in turn, is fostered by public confidence that judicial rulings proceed from a rational development of precedent, and not individual predilection.[17] Such confidence is not promoted by the widespread practice of applying judicial rulings prospectively because such an approach to rule making is generally equated with legislation.

Justice Black highlighted this concern with his statement in *James v. United States*, 366 U. S. 213 (1960) that the normal rule of retroactivity constitutes "one of the great inherent restraints upon this Court's departure from the field of interpretation to enter that of lawmaking . . ." *Id.*, at 225 (dissenting opinion).

These considerations go to the core of the integrity of the judicial process, and they are not to be dismissed lightly. Nor have they been. Only the most compelling circumstances have been found appropriate by this Court to limit a judicial ruling to a prospective application. Thus, in the field of municipal bond litigation a rule of prospectivity is justified because public bond financing would become prohibitively expensive, if not impossible, if bond purchasers had to assume the full risk of any future ruling that invalidated the statute or procedure under which the bonds were sold. In the area of criminal procedure, it is hardly necessary to elaborate on the special factors that may mitigate in favor of prospective applications of rulings which overturn previously accepted procedures. Suffice it to point out that these considerations do not remotely apply to the case at bar. Accordingly, there is no reason to refuse giv-

17. "It is easy enough for the sophisticated to show elements of naivete in this view—and no more difficult to scoff at symbols generally. But the fact remains that symbols constitute an important element in any societal structure—and that this symbolic view of courts is a major factor in securing respect for, and obedience to, judicial decisions." *Id.*, at 62 (footnote omitted).

ing normal effect to the ruling in *Lemon* to prohibit further subsidy payments.

B. The Schools Have No Vested Contractual Right to the Subsidy.

The schools insist that the subsidy applications signed on January 15, 1970, are binding "contracts", executed in reliance on the constitutionality of Act 109; that they have rendered full performance under these "contracts"; and that it would be improper to ignore their alleged rights by refusing to allow reimbursement for the "services" rendered. Although the lower court found it unnecessary to decide this contention (relying instead on a general "balancing of the equities" approach), appellees have continued to press the argument in the apparent belief that their claims are significantly strengthened by calling them "contractual" rather than merely "equitable".[18] Appellants will therefore respond to the contention.

Appellees' position rests upon a false premise: that the entire linguistic scheme of Act 109 (envisoning "contracts" for the "purchase" of "services") must be accepted at face value as a description of reality which the courts cannot look behind. This Court obviously, and quite properly, did not regard itself as so bound in *Lemon*. Throughout the majority, concurring and even dissenting opinions, the statute is described as conferring a "subsidy", "cash grant", "aid" or "support" to the nonpublic schools.[19] These terms do not connote a contractual relationship; they signify a gift, the gratuitous bestowal of a benefit. Con-

18. Appellees concede that there is no constitutional impediment to applying *Lemon* to void pre-existing contractual rights. *Tidal Oil Co. v. Flanagan, supra.* Appellants have argued at pp. 12-18, *supra,* that the rationale of *Lemon* requires denial of any further payments under Act 109, whether or not the relationship between the state and the nonpublic schools is deemed contractual.

19. E.g., 403 U. S. at 610, 620, 621, 624, 652, 653, 654, 665.

sistent with this approach, the Court placed quotation marks around the term "contract" in referring to the statutory vehicle used for providing the subsidy.[20]

It is therefore evident that this Court has already rejected, *sub silentio*, the proposition that the true relationship between the state and each school was that of contracting parties, with each receiving a *quid pro quo*. This rejection was plainly correct. As Judge Hastie pointed out in dissenting from the original lower court decision upholding the constitutionality of Act 109, the nonpublic schools merely submitted, on a form prescribed by the state, an application designating the portions of their curricula for which subsidy was sought. The state then "agreed" to do what the statute already required—that is, to pay the sums mandated by Act 109. The schools did not have to increase their enrollment or change their curricula, or do anything else of benefit to the state. They just applied for aid. One can hardly quarrel with Judge Hastie's conclusion that it is an "artificial characterization" to describe the statutory procedure as "contracting for services". *Lemon v. Kurtzman*, 310 F. Supp. 35, 50 (E. D. Pa. 1969) (dissenting opinion).[21]

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20. 403 U. S. at 609. Intervening defendants-appellees insisted below that this Court, in accepting Act 109's stated purpose of aiding education rather than advancing religion, necessarily also accepted the entire linguistic scheme of the statute, including the term "contract". This is an obvious *non-sequitur*. The purpose of aiding education is equally served by a system of subsidies or contracts. If the substance of the legislative plan is subsidy, it can be recognized as such without denying the secular purpose of the Act.

21. Appellees nevertheless urge that the Pennsylvania courts would regard these subsidy arrangements as "contracts". But the technical notions of "consideration" that might be deemed adequate to support contracts between private parties are scarcely dispositive of whether the legislature, simply by using some magic words in a statute, can transform one kind of legal relationship into another and thereby cloak it from judicial scrutiny. Were it otherwise, the repeated efforts of some legislatures to evade the desegregation man-

In sum, appellees' alleged "contractual rights" are illusory; they do not afford any justification for allowing further payments under Act 109.[22] Without more, this conclusion requires a reversal of the decision below. If the payments are not genuinely contractual, they are manifestly a subsidy, and as argued at pp. 12-18, *infra*, this Court has already ruled in *Lemon* that such a subsidy is, on its face, unconstitutional.

C. The Schools Did Not Innocently Rely to Their Detriment on the Constitutionality of Act 109.

As previously noted, the lower court did not base its decision on a finding that appellees were vested with any contractual rights.[23] Instead, the court baldly asserted—without support of any evidence in the record—that the nonpublic schools had, in reliance on the expected reimbursements, "adjusted their budgets accordingly and per-

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21. (Cont'd.)
dates of this Court by use of subsidized "private" school schemes would have succeeded at least for a time, rather than meeting summary reversal in case after case.

22. Intervenor defendants-appellees insisted below that appellants lacked standing to challenge the validity of the "contracts", as if appellants were seeking to transform this litigation into a contract action. The lower court found it unnecessary to decide this claim since it did not base its decision on a finding of contractual rights, but it suffices to point out that appellants have challenged the constitutionality of Act 109, and as part of that challenge they also have standing to urge an interpretation of the statute and its operative effect.

23. Said the lower court:

"[W]hether the reimbursements constituted payments under the contracts or a subsidy makes no difference in our decision. Nor does it lessen the reliance of the non-public schools on the payments or the subsequent hardship upon them if the payments are not made." Appendix to Jurisdictional Statement, at 9 app-10 app, fn. 6.

formed the services required by them." Noting that a denial of the funds would impose a "substantial burden which would be difficult for them to meet", the court allowed the payments to avoid this "hardship". Appendix to Jurisdictional Statement, at 9 app-10 app.

Appellants have previously argued that this amorphous "balancing of the equities" approach goes far beyond the appropriate boundaries of prospective limitation drawn by this Court, and ignores the common understanding of the risks attendant to any litigation. But not only is the District Court's conclusion unprecedented, it is implicitly based on a proposition already rejected out of hand by this Court in *Lemon;* i.e., that state aid to parochial schools can be justified because their financial situation is desperate. Surely it is beyond argument that fiscal need (even assuming the dubious proposition that nonpublic schols are financially worse off than the public schools) is not a factor entitled to any weight whatsoever in evaluating appellees' claim.

Moreover, the lower court has failed to demonstrate that any assumed "reliance" by the nonpublic schools was justified. Apart from the total lack of evidence establishing that the schools provided any "services" during the 1970-71 school year which they would not have furnished anyway without Act 109, it is abundantly clear that the nonpublic schools simply took a chance on obtaining reimbursements for 1970-71 in full awareness that the validity of Act 109 was, at the very least, open to serious question.

Thus, the schools did not even sign reimbursement "contracts" for the 1970-71 school year until a month after an appeal had been filed with this Court from the initial 2-1 decision by the District Court. "Services" were not provided by the schools until several months after this Court had noted probable jurisdiction of the appeal, and well after

June 15, 1970, when the Rhode Island parochial school salary subsidy legislation had been unanimously struck down by a three-judge court in *Dicenso v. Robinson*, 316 F. Supp. 112 (D. R. I. 1970).

In short, Act 109 from its very conception was understood by all interested parties—particularly the parochial schools—as a calculated effort to skirt the shoals of the First Amendment. Appellants do not suggest that the effort to obtain public aid through Act 109 was legally reprehensible in any sense; but no one seeking aid under the statute had any illusions about the inevitability of a legal challenge and the certainty that this Court would ultimately have to decide the issue.

The lower court found that appellees' "reliance" was warranted by the presumption of constitutionality which the Pennsylvania Supreme Court has said attaches to any legislation.[24] But this proposition proves too much. Could a segregated school legitimately "rely" on a statute providing it with state aid? Manifestly, the right to further subsidies under facially unconstitutional legislation cannot rest on such a slender reed.

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24. The case cited by the lower court is *Philadelphia v. Dupuy*, 431 Pa. 276, 244 A. 2d 741 (1968), where a provision of the state gross receipts tax statute was upheld against a challenge of unconstitutionality. The court's opinion is full of such phrases as "one seeking to show a statute unconstitutional must carry a very heavy burden", and "all doubt is to be resolved in favor of sustaining the legislation", and "the taxpayer's burden will be deemed met only if the challenged statute *clearly, palpably* and *plainly* violates the Constitution." 436 Pa. at 279, 244 A. 2d at 743. (emphasis in original).

Whatever the validity of such standards as applied to a challenge of tax legislation, they clearly have no place in litigation seeking to uphold fundamental First Amendment rights. Contrast the language of this Court in *Lemon*:

> "A law 'respecting' the proscribed result, that is, the establishment of religion, is not always easily identifiable as one violative of the Clause. A given law might not *establish* a state religion but nevertheless be one 'respecting' that end in the sense of being a step that could lead to such establishment and hence offend the First Amendment." 403 U. S. at 612.

Nor could the schools legitimately rely on the initial District Court ruling which upheld, by a 2-1 margin, the constitutionality of Act 109.

> "If the precedent [relied upon] was made in a lower court and has never been passed upon by the highest court of the jurisdiction, reliance upon it is generally held to be similar to reliance upon an uninterpreted statute—the party relying does so at his peril." *Prospective Overruling and Retroactive Application in the Federal Courts,* 71 Yale L. J. 907, 947 (1962).

A fortiori, the schools could not rely with impunity on a lower court ruling which was already on appeal to this Court before any alleged acts of "reliance" occurred, and which (in the face of this Court's prior decisions) was of doubtful merit.

It can be plausibly argued that the power of prospective limitation should be confined to cases involving overruling of precedent—and, indeed, this is by far the most common circumstance in which this Court has applied or even considered the doctrine.[25] But even assuming that the logic of the position cannot be confined quite so narrowly, it surely extends no farther than situations in which a new decision has substantially altered what was previously assumed to have been the law.[26] Notwithstanding the initial ruling of the lower court as to Act 109, no one could, in all candor, regard *Lemon* as fundamentally altering the landscape of the First Amendment as applied to church-state relations. Appellees may have been disappointed at the outcome of *Lemon,* but they can scarcely claim surprise.

In the words of Justice Harlan, the schools simply assumed one of "the risks of life" in seeking a subsidy for

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25. E.g., *Gelpcke v. Dubuque,* 68 U. S. 175 (1864); *Douglass v. County of Pike,* 101 U. S. 677 (1879); *Chicot County Drainage District v. Baxter State Bank, supra; Linkletter v. Walker, supra.*

26. See *Cipriano v. City of Houma,* 395 U. S. 701 (1969).

the 1970-71 school year. *United States v. Estate of Donnelly, supra,* at 296 (concurring opinion). They cannot now make the state underwrite that risk in contravention of this Court's mandate in *Lemon.*

III. A Prospective Limitation on *Lemon* Will Have Potentially Profound Adverse Consequences in Future Constitutional Litigation Concerning Expenditure of Public Funds.

Appellants have argued that the rule of law adopted by the District Court represents a profound expansion of the doctrine of prospective limitation. Neither the precedents of this Court, nor the equities of this case favor the outcome reached below. But there is a larger dimension to the ruling of the lower court which may have impact on a broad class of constitutional adjudication concerning expenditures of public funds. Just as the ultimate reach of the Religion clauses of the First Amendment may be only dimly perceived, so the precise ultimate impact of the ruling below may be difficult to measure in this respect. It is not too much to say, however, that the rationale has potentially ominous consequences extending far beyond the particular circumstances of the case at bar.

The logical import of the opinion below is that whenever a legislative scheme of public expenditures is adopted, private parties can, by undefined acts of "reliance" commit the state to expending public funds, even after a judicial determination that the statute is unconstitutional on its face. However unintentially, this rule of law will inevitably encourage legislative efforts to obligate public funds for popular, if probably unconstitutional, purposes.

This could have unfortunate ramifications, particularly in the area of parochial school aid legislation. It is a proper subject for judicial notice that such legislation has been

passed in many jurisdictions, and that, particularly in Pennsylvania, new statutes have been adopted as soon as prior ones have been struck down. One pernicious result of the ruling below is that it may encourage legislatures to continue seeking ways to get public funds into the religious schools through constitutionally dubious means, in the belief that some subsidy is better than none, and in reliance on the lower court's notion that "contractual" subsidy arrangements entered into before a statute is declared void will safeguard subsequent payment of the subsidy even if only on a temporary basis.

Consider the opportunities that such an approach would have presented to certain legislatures during the days of "massive resistance" to this Court's rulings on school desegregation. One can hardly doubt that various "private" school subsidies would have been enacted with full legislative trappings to emphasize "vested contractual rights". Any rule of law which encourages, however indirectly, such a course of conduct should be avoided. It contributes to the undermining of public confidence in the judicial processes, and tends to set courts and legislatures unnecessarily in stances of opposition to each other.

The potential for political discord and strife which can arise under such circumstances is particularly evident in the area of aid to religious schools. Perhaps the ultimate significance of the ruling in *Lemon* is that it marks a major effort by this Court to withdraw the issue of parochial school aid from the political arena. By drawing definitive limits around permissible uses of public funds in this sensitive area, this Court has sought to avoid political division on religious lines which, as this Court held in *Lemon*, was one of the principal evils against which the First Amendment was intended to protect.

Weighed against these broad considerations of constitutional and judicial policy, there are no countervailing

interests which require permitting the disbursement of further funds under Act 109 as authorized by the court below. The doctrine of prospective limitation is appropriate in certain very limited situations. The case at bar presents no circumstances to warrant its application here.

IV. CONCLUSION.

For all the foregoing reasons, the Order of the lower court dated December 28, 1871 should be reversed insofar as it permits the further disbursement of any funds, under and pursuant to Act 109, to any religious or church-related school.

Respectfully submitted,

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